

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-218465.2 **DATE:** January 15, 1986
MATTER OF: Benco Contract Services Co.

DIGEST:

1. Protest against alleged ambiguities in the language of solicitation, filed after bid opening, is considered timely where the protester reasonably was unaware, prior to the closing date, that its interpretation was not the only one possible.
2. A deficiency in an invitation for bids, discovered after bid opening, does not preclude a valid award where award would meet the government's actual needs and there is no showing of prejudice to other bidders.

Benco Contract Services Co. protests the award of a food services contract to Renaissance Exchange, Inc. by the Air Force under invitation for bids (IFB) No. F34650-85-B-0051. Benco protests that the IFB was ambiguous, or, in the alternative, that the awardee's bid was not responsive to the terms of the solicitation.

We deny the protest.

Background

The procurement was for food services to be provided at Tinker Air Force Base, Oklahoma. When the bids were opened, it was determined that Benco's bid was seventh low. The four apparent low bidders were found ineligible for award for a variety of reasons. Renaissance had submitted the apparent fifth low bid and Aleman Food Service, Inc. was sixth low. These two bids were initially considered to be nonresponsive for failure to comply with a requirement in Part I of the bidding schedule. The section of the IFB at issue stated:

"The total estimated bid for CLIN [contract line item number] 0001AB [variable meal price] for the year must

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be at least 25% (+/- 0.1%) of the total bid price for CLIN 0001AA [basic fixed costs]."¹/

The paragraph also advised bidders that failure to comply with the requirement would render the bid nonresponsive.

The agency and the protester agree that in order to be responsive, a bidder's variable costs cannot be less than 25 percent of the fixed costs, allowing a 0.1 percent margin for error. However, they disagree on the method of calculating the acceptable range for the variable costs under the IFB terms. The contracting officer initially construed the "25% (+/- 0.1%)" requirement to mean that a bidder's variable costs had to be 25 percent of its fixed costs, plus or minus 0.1 percent. To illustrate: Renaissance's bid for fixed costs was \$228,000; under this interpretation, its bid for variable costs would have to fall within 0.1 percent of \$228,000 x 25 percent, which is to say \$57,000 plus or minus \$57, or \$56,943-\$57,057. Since Renaissance had bid \$57,072 for variable costs, the contracting officer considered it to be nonresponsive. Under this interpretation, Aleman was also nonresponsive.

The contracting officer initially advised Benco that it appeared to be in line for award since each of the six lower bids had some defect. Upon further reflection and discussions with other procurement officials, however, the contracting officer determined that the true meaning of the term "25% (+/-0.1%)" was 24.9 percent-25.1 percent. Under this interpretation, the acceptable range for Renaissance's bid on item 0001AB was between 24.9 percent x 228,000 and 25.1% x 228,000, or \$56,772-\$57,228. Since Renaissance had bid \$57,072 for this item, the firm was eligible for award under this construction of the IFB terms.

After further consideration and consultation with its legal office, the Air Force concluded that no changes to the solicitation were necessary, and that the term "25% (+/-0.1%)" meant 24.9 percent to 25.1 percent of fixed costs, rather than the product of 25 percent times the fixed costs amount with the margin of 0.1 percent applying to that figure. The contract was then awarded to Renaissance.

¹/The variable meal price was the actual number of meals served multiplied by the unit meal price, and covered variable costs and profit. (For evaluation purposes, the solicitation provided an estimated annual meal quantity.) The basic fixed costs were the majority of the fixed costs incurred by the contractor.

Analysis

Benco protests that the terms of the IFB are ambiguous because they are susceptible to two reasonable interpretations, or, alternatively, that Renaissance's bid was nonresponsive to the terms of the IFB. The Air Force argues that any ambiguous language in an IFB must be protested before bid opening, and that Benco's protest is therefore untimely.

The agency is correct in stating that generally, alleged ambiguities in the language of a solicitation provision must be protested to our Office prior to the solicitation's closing date. We have recognized an exception to this rule, however, where the protester was unaware, prior to the closing date, that its interpretation of the solicitation provision was not the only one possible. Tenavision, Inc., B-216274, Apr. 15, 1985, 85-1 CPD ¶ 427. This is because absent awareness of a second interpretation, the protester cannot be charged with knowledge of an ambiguity. Id.

Here, the agency argues that the exception does not apply because the alleged ambiguity should have been apparent on the face of the solicitation. We do not agree. The contracting officer himself originally interpreted the term as the protester does and did not consider any other interpretation until his initial understanding was challenged. In these circumstances, we cannot conclude that the alleged ambiguity should have been obvious to the protester.

The agency argues, further, that even if the alleged ambiguity was not apparent before bid opening, the protest is still untimely because it was not filed within 10 days after the basis for the protest was known or should have been known, as required by section 21.2(a)(2) of our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(2) (1985). The agency contends that Benco was informed in mid-July either that the contract would be awarded to Renaissance or that the agency was re-analyzing the terms of the IFB and that Benco was no longer in line for award. Since the protest was not filed within 10 working days of this conversation, the agency contends that it is untimely.

It is not clear from the record exactly what was communicated to the protester in July. The agency report indicates that the Air Force advised Benco that Renaissance was eligible for award at this point, whereas the protester alleges that the contracting officer only stated that some changes might be necessary and that the requirement was

likely to be resolicited, but did not actually state that Renaissance's bid had been found responsive. If, as the protester contends, the contracting agency only referred inconclusively to an ongoing process of re-examining the IFB terms and considering whether the requirement should be resolicited, then the basis for the protest was not mature and Benco was not required to protest at that time. Where such doubt exists about the timeliness of a protest, it is our practice to resolve it in favor of the protester. See Air Flight Service, B-216996, Apr. 12, 1985, 85-1 CPD ¶ 420. We therefore consider Benco's protest to be timely.

Turning to the merits of Benco's protest, we find no basis to disturb the agency's award determination. In this connection, we find that the agency's interpretation of the phrase "25% (+/- 0.1%)" is at least as reasonable as Benco's interpretation.^{2/} Moreover, the fact that a solicitation is deficient in some way does not preclude a valid award if the award would meet the government's actual needs and there is no showing of prejudice to other bidders. Browning Ferris Industries of the South Atlantic, Inc. et al., B-217073 et al., Apr. 9, 1985, 85-1 CPD ¶ 406. Benco does not dispute that the award to Renaissance meets the government's needs, nor has it shown that it was prejudiced by the application of the agency's interpretation of the provision here.

Although Benco does allege that it had to calculate its bid far more cautiously under its interpretation of the IFB since that interpretation allows for a smaller margin of error than the government's interpretation, Benco has neither alleged nor shown that its bid would have been lower (enabling it to displace Renaissance and Aleman) had it known of the agency's interpretation. Furthermore, even under Benco's interpretation of the IFB provision, Renaissance's bid remains low. In fact, the effect of applying Benco's interpretation to Renaissance's bid is to require Renaissance to lower its bid price. For instance, as discussed above, Renaissance's variable price for the first year could not exceed \$57,057 under Benco's interpretation, while Renaissance's actual first year price for those costs was \$15 more or \$57,072. Similarly, Renaissance's bid of \$81,218 for variable costs for the first option year would have to be reduced by \$137 under Benco's interpretation, and its bid of \$171,275 for variable costs for the second option year would have to be reduced by \$104. Under these circumstances, we fail to see how Benco's competitive position was adversely affected by the perceived ambiguity in the solicitation.

^{2/}We agree with the agency that the placement of the parenthetical suggests that it be understood to modify the term "25%."

Accordingly, we find that the award to Renaissance is not objectionable. Benco's protest is denied.

for Seymour E. Gross
Harry R. Van Cleave
General Counsel